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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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vs.

THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Jurisdiction

The decision of the New York Court of Appeals was rendered and the remittitur of the court issued on June 10, 1976 (A.1a). Petitioner's motion to amend the remittitur was withdrawn September 3, 1976 (Mo. No. 672-Mtr. of City of N.Y. [Alantic Imp. Corp.],- NY 2d -). The petition for a writ of certiorari was filed September 7, 1976.

Question Presented

This Court having held, in the very case cited by petitioner as authority for review of State court awards, that "Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right" (McCoy v. Union Elevated R. R. Co., 247 U.S. 354 363 [1918]; Pet., pp. 19-20), has any fundamental right been denied a condemnee who, on each of two trials, presents valuation evidence generally regarded as too speculative to provide a basis for award, and is ultimately awarded several times the price he had paid for the property three years

prior to condemnation?

Statement of the Case

In 1960, petitioner's parent company contracted to purchase 785 acres of land at the westerly end of the Rockaway Peninsula in Queens County bounded by the Atlantic Ocean and Jamaica Bay (hereinafter Breezy Point) for $17.5 million, or approximately $22,000 per acre (A.55a). The land was then occupied, on 10-year leases, by about 3,000 bungalow owners in two summer bungalow colonies, one on the central portion thereof (370 acres) and the other at its easterly end (45 acres) adjoining Fort Tilden; it contained neither streets nor storm or sanitary sewers; was 3 miles from the nearest public elementary school and 4 miles from the nearest subway; its low elevation caused serious flooding during storms;

winds exceeding 15 miles per hour occurred about 30% of the time and tide action, currents and storms rendered the westerly part of Breezy Point, i.e., the "Tip" area, one of the most exposed areas in the metropolitan region (A9a-10a; F501-2, F2783-5; F514-516; 796-7).*

The property had been placed on the market in 1958 (A8a-9a, A17a; F.490-3, F.498). The seller, who "had developed and controlled not only Rockaway Point and Breezy Point but had also developed Atlantic Beach" (F. 2790; F.5014;838), advised the buyer that the owners of the

*The City has requested that the record on the last appeal to the Court of Appeals be certified to this Court. References to pages of the first trial transcript made part of that record by stipulation (vols. I, II, III-gray covered) are preceded herein by the letter F; and references to the transcript of the retrial (vols. IV, V, VI, VII-blue covered) are by page number alone.

cottages would resist ouster and consequent loss of investment in their summer homes (F.585-7, F.495-6). The purchasers promptly announced, many months prior to the closing, that they planned to build the nation's largest privately financed apartment house community at Breezy Point, a "city within a city," and made it plain that the tenants' 10-year ground leases would not be renewed (F.521-522). The tenants, "apprehensive of losing our homes," thereupon formed the Breezy Point Cooperative, and after several months of negotiations agreed to pay $12 million for the 415 acres of Breezy Point upon which their colonies were located (F.521-6, F.545). Petitioner's cost of the remaining land (368 acres) - consisting of 209 acres at the Tip in the westerly end of the peninsula improved with a beach club;

143 acres similarly improved with a beach club, located one mile east thereof and abutting the co-op's central tract; plus a 16-acre strip providing a right-of-way across the co-op's land to the otherwise landlocked Tip - was thus $5.5 million (A9a; A55a).*

(1)

Several months after the closing in January of 1961, a firm of consulting engineers recommended a development plan for the smaller tract, projecting thereon 6,900 apartments to house approximately 25,000 persons on 210 acres, after 65 acres of city-owned submerged land in Jamaica Bay

*Petitioner allocated $1.1 million from its $5.5 million purchase price to the improvements (beach clubs) on its books, and $4.4 million to the land-equivalent to $12,000 per acre for the 368 acres thus acquired (F.800-802). The beach clubs were subsequently rebuilt and the $4 million awarded for improvements at the first trial was accepted by the parties (F.373-4, F.470; A.17a, A.63a).

were acquired from the City and filled in (A13a; A53a). The residential community thus projected was to be provided with streets, storm and sanitary sewers, 4 public schools, 6 churches, police and fire stations, 3 shopping centers, libraries, etc.; it required remapping and rezoning of the land; an extensive fill operation to elevate the land by at least five feet; would take seven years to complete at a cost "in the order of $150,000,000 to $200,000,000"; and an over-all developer's agreement with the City was required on remapping, rezoning, public schools, police and fire protection, acquisition of the city's land, etc. (F.102, F.137, F.185, F.271; A12a-13a;

A53a).*

In February of 1962, petitioner received final rejection from the FHA for mortgage insurance on four apartment houses which it proposed to erect (F.784-792, F.2861-5). The FHA stated that the proposed development was "not economically feasible"; the land was in a remote area "relative to transportation and employment," and "during periods of storms, tides and hurricanes, is constantly flooded"; that accessibility "during storm periods is hazardous in the interests of tenant and public safety"; and the "cost to bring sewers, water and complete fill and street improvements to the project"

*The City's new Zoning Resolution, effective Dec. 15, 1961, had rezoned Breezy Point from 1-D, permitting a density of 225 apartments per net acre, to R4, permitting 39 apartments per net acre (F.109, F.2724-6;927).

would be excessive" (A.10a).

In March of 1962, a bill authorizing alienation of the City's land in Jamaica Bay was introduced in the Legislature, but failed of enactment and was never again introduced (A.13a; F.435-6, F.1208-9, F.2707-8). In June of 1962, petitioner filed a site plan with the City Planning Commission in support of its rezoning and remapping applications, projecting 55 apartment houses containing 6,900 apartments on the smaller tract, inclusive of the City's land (F.866-7). Opposition of various conservationist groups led to the Planning Commission's adjournment of its hearings on said applications in August and September of 1962; the "overall developer's agreement" sought by petitioner on public schools, police and fire protection, rezoning, etc.

was never completed or approved by the Board of Estimate; and in November of 1962, the Mayor appointed a committee to report on the advisability of converting Breezy Point into a park (F.147-8, F.2731-3; F.140; F.140; F.100, F.2403, F.2696-7, F.2692, F.2731).

Thereafter, in December of 1962 and January of 1963, petitioner commenced construction of 8 apartment houses and a shopping center on 5% of the land under review, i.e., a 21-acre site in its smaller tract, without any agreement on public schools, police or fire protection therefor, etc. (F.447, F.452). The City condemned the remaining 122 acres in petitioner's smaller tract in November of 1963, and the 209-acre Tip area in August of 1964. Petitioner abandoned any attempt to complete the 8 apartment houses on the

21-acre site, facing a shortage of $6.5 million in its financing thereof, and 4 years later, in October of 1967, the City agreed to purchase that site by repaying petitioner $5.6 million expended on construction and to buy the land at the unit price fixed by the award herein (A.53a; A13a; F.2560-4, F.2621-4). Apart from a remodelled beach club on the 209-acre Tip, and a second beach club on the 122 acre tract, the property condemned by the City, as the Court of Appeals pointed out, was vacant-"the same land in the substantially same condition of improvement" as when acquired by petitioner 3 years prior to condemnation (A.52a; F.476, F.480).

(2)

Although it had paid $5.5 million for the subject property 3 years prior to condemnation, petitioner claimed $70 million

therefor at the first trial, exclusive of the 21-acre site not taken. In support of that appraisal, its expert Wittman valued rental income from a completed apartment house community hypothetically erected on the smaller tract by capitalizing his income projections therefrom; relied upon land values shown by 51 sales of apartment house sites in fully devloped and long established residential centers; and then transferred to the 209-acre Tip area the values thus derived for the smaller tract (A.52a-56a). On the basis of that proof, $40 million was awarded (A.63a).

The Court of Appeals rejected the award because it was based on speculative proof violative of settled rules of valuation, stating that "neither theory as developed on the trial will support the award" (A.53a). As to valuing non-existent

income from a non-existent residential community containing dozens of hi-rise buildings on the vacant land under review the court pointed out that "no part of the work had been contracted for or started. The proposed development of the 'tip' was a plan without detail and this part of the property, low-lying and exposed to strong tidal and wind action would have required extensive fill to be usable for any residential development"; that "[e]laborate forecasts of income from non-existent structures on land which needed large physical change to be usable for the purpose is not a proper measure of fair market value"; and that the instant case was "indistinguishable" from many others where it had similarly rejected valuations of non-existent income from projected improvements "not yet

financed, on which no work had even been begun on the day of taking" (A.53a, A.54a).

As to the sales proof relied on as a basis for award, the Court of Appeals pointed out that awards must be based on sales of land "similar" to the property being valued (A.56a). The subject property "was not only vastly larger than the land to which it was compared, and markedly different in adjacent development, but its physical location on the Rockaway peninsula differed radically," said the Court, i.e., it "was raw, vacant land in a remote, inaccessible, undeveloped area," whereas the sales relied on were of land "in long-established, densely populated residential centers" (A.54a, A.55a). Rejecting the proposition that a claimant may be thus permitted, on the strength of a paper community, to harvest values created in

established residential centers by heavy investment of private and public funds, the Court noted that, as Wittman had conceded, "the theory essentially depended on the projected completion of claimant's entire future plan at a cost for construction alone of $275 million and on comparison of this projection with the other sample properties" in already thriving communities (A.55a-56a). In remanding for further proceedings, the Court of Appeals stated that "the only directly comparable property suggested by the record was the sale of 415 acres of contiguous land" by petitioner to the Breezy Point Cooperative, and that said sale should be considered "as well as the price paid by claimant for the land itself" (A. 55a, A.56a).

In May of 1972, a second trial was conducted, the parties stipulating that major portions of the 1966 trial record be incorporated in the new record (8-15). With the exception of a 52-acre site in a residential community in the Birchwood section of Queens, the Trial Court found that petitioner's proof depended on sales of land "vastly smaller as compared with the land in issue," i.e., sites that ranged up to 6 acres in size (A.40a). Although repeatedly stating that all the sales "are not comparables in that they are not similar with emphasis on the word 'similar'" (2028; 2045; 2020-1, 2025-6, 2032-3), the Trial Court nevertheless justified reliance upon the Birchwood sale for an award of $31 million (A.40a-41a; A.26a). It stated that "when the

market value is too difficult to find, *** basic equitable principles of fairness" may be made the basis of award (A.51a). It said (A.47a): "Stated in capsule fashion, this is a case 'where there are no appropriate comparable sales, where the land is vacant and unproductive and there is no income to capitalize, where the actual purchase price and the assessed valuation may not furnish a true guide to value'" (A.47a).*

The Court of Appeals rejected the proposition that market value was too

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*Although petitioner bluntly acknowledged in its Appellate Division brief that the $31 million award was primarily based on the Birchwood sale, stating that "the Court based its value primarily on one sale that it, rightly enough, regarded as the 'closest comparable'" (Pet.'s App. Div. br., p. 5), it would now apparently have this Court believe that the Trial Court relied upon "two of claimant's proffered sales," namely, the 133-acre Twin Pines site, as well as Birchwood (Petition, pp. 11-12, 15).

difficult to find, pointing out that - "little, if any, weight was given the prior sales of the subject property," which that Court had previously held to be of probative worth; that "great emphasis was placed upon the Birchwood 'comparable,' which should not have been considered" in light of its prior ruling that high rental land values in established residential communities may not be transferred to raw land in a paper community on the basis of "similarity"; and agreed with the two dissenting Justices in the Appellate Division that equitable principles of fairness could not justify departure from sound valuation rules in order to afford petitioner a $22 million profit herein (A5a; A18a; A12a). Agreeing with those dissenting Justices

that "the proper test for vacant land, unexploited or only partially exploited, is that found in Mtr. of City of N.Y. (Chestnut Props. Co.) (39 AD 2d 573, affd. 34 NY 2d 800)," the Court remitted the case to the Appellate Division for "reappraisal in light of the dissenting opinion" (A5a-6a).*

*The cited case effectively holds that "where, as here, the planned development of land is interrupted by condemnation, the best criteria of market value is the price a purchaser would pay for the land in the state of exploitation to which it had progressed at the time of vesting of title in the condemnor" and such purchaser would be guided, particularly in the absence of comparable sales, by "the recent actual sale price of the subject property" plus recompense for the work done "in preparing it for its contemplated use" (39 AD 2d at 574). An apartment house under construction in the cited case had been accepted as the land's best use.

In reappraising the case "in light of the dissenting opinion in this court," the Appellate Division fixed the award at $15 million as recommended therein, stating that "we have arrived at the same result, and for the same reasons, expressed in that dissent" (A4a). Those reasons had been fully set forth by the dissenting Justices in a detailed analysis of the record proof of both trials, as follows:

It was thus pointed out that "the FHA considered even a small part of any such proposed development to be economically unfeasible" (A12a); petitioner's planned 55-apartment house community on the smaller tract required 7' of fill to bring the land

to grade, would take 7 years to complete at a cost of $150-$200 million, and twice that time and investment would be required to create a "full-grown community on both tracts" (A12a, A14a); in over a decade "not a single conventionally financed high-rise apartment house had been successfully completed anywhere on the Rockaway peninsula" (A12a); the "financing procurable was grossly inadequate" and petitioner "wholly inexperienced" with any such developments (A12a); its plan depended on acquiring and filling "a sizable tract of city-owned land in Jamaica Bay," which petitioner had failed to secure (A13a); the "remapping of streets, rezoning agreements with the city on public schools, police

and fire protection, etc., had already encountered substantial public opposition" (A13a); as to the buildings started on the 21-acre site not taken, mortgaging all of its land and assets had enabled petitioner to secure 50% of the construction costs requested of the FHA, leaving a $6.5 million deficiency therefor (A13a); "normal financing was not available for executing" its apartment house community concept "in this remote area" (A13a-14a); "claimant made no attempt to establish that the abandoned buildings would have proven profitable," whereas the City's experts had established the contrary, and - "their views, unlike that of the claimant are amply supported by the evidence" (A14a); a projected use not shown likely of achievement in

the reasonably near future "may not be the basis for a finding of value" (A14a); where a "proposed high risk development is to take place in a remote, inaccessible area and where there is a complete absence of credible proof that the venture is economically sound, we may not by any common-sense standard, assume its ultimate success. Indeed, every realistic sign points to its probable failure" (A.12a).

Although "the risks inherent in this venture are much greater" than those found in cases where a planned use of land in an early stage of development was accepted as a basis for award, it was concluded that the same rule should be applied here, namely, the award

should be based on "actual sale price plus recompense for developmental enchancement" (A16a-17a). Accrediting the valuation of City expert Tuchler, who had appraised the land at $11,819,000 in reliance "primarily on the two sales that offered the most comparability and that was the subject property and the other property contiguous" thereto sold to the Co-op (1747; 1751-2, 1757, 1760-1; 1631, 1659, 1804-6), an award not to exceed $15 million was held appropriate herein (A18a).

Thus, petitioner's actual purchase price, which included beach clubs previously compensated and the 21 acres not taken, was $5.5 million; it had expended $5.6 million on the abandoned buildings partially built

on said 21 acres, $3.4 million to rebuild the beach clubs, $640,000 in bonuses to get financing, and various sums for real estate taxes, architect and legal fees, etc. - for a total investment of $19.3 million (A17a; F799-804, F815, F849). Against that investment, it had already secured $10.7 million - $5.6 million for the abandoned structures purchased by the City, $1.1 million for the 21 acres thereunder, "$4 million for the beach clubs by virtue of the award made at the first trial" - leaving a balance of $8.6 million (A17a). Deducting therefrom $4,400,000, "the amount allocated by the claimant to its purchase price for the unimproved land" and to be separately compensated herein - "leaves a figure of $4,300,000 representing the costs of

developmental enhancement" (A17a).*

The Appellate Division awarded $15 million "for the same reasons" specified by the dissenting Justices and above set forth (A4a). The Court of Appeals, in affirming that award

*The City contended that of the $19.3 million in total expenditures, no prospective purchaser could reasonably be expected to view $640,000 in bonuses for financing; beach club losses in amount of $451,822; or $450,000 in real estate taxes as enhancing land value (F802, 812, 815, 849). Although the award for the land ($15 million), and the $10.7 million previously secured by petitioner, exceeded its total investment ($19.3 million) by $6.4 million, petitioner asserts that the award "represents a destruction of the investment in claimant's securities" (Pet., p. 16). The plain fact is that 91% of petitioner's common stock had been acquired by the "insiders," the holders of preferred shares, at 25-cents per share (City Ex. 26, pp. 4, 6, 8-9, 31-32). And any post-condemnation actions by petitioner that may have reduced funds available for distribution to holders of preferred stock cannot alter the fact that it has received $6.4 million above total investment.

stated that "the proof submitted during the two trials of allegedly comparable sales did not involve property which could be considered in any way or on any analysis comparable to the condemned property" (A.1a).

ARGUMENT

AN ISSUE OF QUANTUM, RESOLVED ON CONFLICTING APPRAISAL EVIDENCE ADDUCED AT TWO TRIALS, PRESENTS NO SUBSTANTIAL FEDERAL QUESTION. THERE IS NO FUNDAMENTAL RIGHT TO AN AWARD BASED ON SPECULATIVE PROOF OF VALUE.

This Court has repeatedly held that it will not grant a writ of certiorari "merely to review the evidence or inferences drawn from it." General Pictures Co. v. Electric Co., 304 U.S. 175, 178 (1938); see United States v. Johnston, 268 U.S. 220, 227 (1924). In summarizing the cases dealing with review of condemnation awards made

by State courts, the controlling rule was thus set forth- "when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence." Roberts v. New York City, 295 U.S. 264, 277-8 (1935); see also, Bailey v. Anderson, 326 U.S. 203, 205 (1946); Appleby v. Buffalo, 221 U.S. 524, 531-2 (1911); Stern & Gressman, Supreme Court Practice (3d ed., 1962), p. 142. "A claimed inadequacy of the awards however, does not raise a constitutional question." 3 Nichols, Law of Eminent Domain (revised 3d ed., 1973), p. 11; 1 Nichols, op. cit., p. 4-229.

In the only case cited by petitioner to justify the writ sought herein, this Court stated that: "Our concern is not

to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right." McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 363 (1918) [Pet., pp. 19-20]. After two trials, at which it was afforded every opportunity to introduce valuation evidence of probative worth to support its exorbitant claimed valued, petitioner's inability to do so can scarely be deemed a denial of due process.

(1)

Although the $15 million award for the subject vacant land was based on the City's appraised value of $11,819,000--which, in turn was several times petitioner's own

purchase price 3 years prior to condemnation (ante, pp.6,24-26)--petitioner urges that the writ should issue because an "award based on the owner's costs rather than on market value" may be "seized upon by condemning authorities across the land as a license" to deny just compensation, and "become a pattern for subverting constitutional guarantees" (Pet., pp. 16, 18-19).

As this Court long ago observed of market value-"Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons." United States v. Miller, 317 U.S. 369, 374-5 (1943). That such guesswork is largely eliminated by a recent sale of the subject property and of a tract contiguous thereto, as here,

is uniformly recognized. In fact, only in the absence of a recent sale of the subject property are sales of other parcels considered the best evidence. "This court is definitely committed to the proposition, which so far as we know is generally accepted, that, in the absence of recent voluntary sales of the condemned land itself, usually the best evidence of value available is the prices at which comparable lands in the vicinity of the land condemned" were sold. Bailey v. United States, 325 F. 2d 571, 572 (1st Cir., 1963). Thus, a sale of the subject property is uniformly recognized as "evidence of the very highest rank to determine the true value of the property as of that time." Matter of Woolworth Co. v. Tax Comm., 20 NY 2d 561, 565 (1967), 232 N. E. 2d 638; United States v.

Certain Land in Borough of Brooklyn, Etc., 346 F. 2d 690, 693 (2d Cir., 1965). In short, the cost of land, as shown by a recent sale thereof, is uniformly regarded as probative evidence of its value, and to award several times that amount, as here, can scarcely be deemed a denial of due process.

(2)

Petitioner contends next that it was denied its fundamental right to a fair trial because "for the first time that we know of in a condemnation proceeding, all market data has been excluded from consideration" (Pet., p. 16). As stated by the Court of Appeals (A.1a)--"The simple answer is that the proof submitted during the two trials of allegedly comparable sales did not involve property which could be considered in any way or on any analysis

comparable to the condemned property."

On the first trial, petitioner relied on sales of land in long-established and heavily populated residential communities to value acreage in a paper community located in a remote and inaccessible area (ante, pp. 11-13). It is uniformly held that land in a developed area is not similar to acreage in an undeveloped area. County Board of School Trustees v. Batchelder, 7 Ill. 2d 170 (1955), 130 N.E. 2d 175, 179; Waukegan Park Dist. v. First Nat. Bank of Lake For., 174 N.E. 2d 824, 827 (S. Ct., Ill., 1961); State v. Gorga, 54 N.J. Super. 520 (1959), 149 A. 2d 266, 268-9; Southern Elec. Generating Co. v. Leibacher, 110 So. 2d 308, 315 (S. Ct., Ala., 1959); Commonwealth v. Bond, 391 S.W. 2d 692, 693 (C.A., Ky., 1965); Cravens v. Amarillo, 309 S.W. 2d 903 (Tex. Civ. App., 1958), cert. den.

358 U.S. 882 (1958); Miss. State Hwy. Comm. v. Hall, 174 So. 2d 488, 494 (1965); Memphis Housing Auth. v. Mid-South Title Co., 443 S. W. 2d 492 (Ct. App., Tenn., 1968); Arkansas State Hwy. Comm. v. Welter, 444 S.W. 2d 65, 67 (S. Ct., Ark., 1969); Triple Cities Shopping Ctr., Inc. v. State of N.Y., 26 AD 2d 744, 745 (3rd Dept., 1966), affd. 22 NY 2d 683 (1968); Vasile v. State of N.Y., 30 AD 2d 1042, 1043 (4th Dept., 1968), affd. 24 NY 2d 969 (1969); United States v. Certain Land in Squares 532 and 570, 473 F.2d 94, 95 (D.C. Cir., 1972).

On the second trial, the trial court found that "'there are no appropriate comparable sales'" (ante, p. 17). That court's reliance upon a sale of land in an established residential community in Birchwood, while conceding its dissmilarity to the

subject property, was again rejected by the Court of Appeals (ante, pp. 16-19). Neither the absence of comparable sales, nor petitioner's failure to establish that any such sales were of greater probative worth than the two Breezy Point sales actually relied on in fixing the award, denotes a denial of due process.* At best, it would amount to that "dubious mistake in the appraisal of the evidence" which

*Affirmed awards will not be sustained by the New York Court of Appeals where not supported by substantial and legally competent evidence or where based upon any erroneous rule. St. Agnes Cemetery v. State of N.Y., 3 NY 2d 37, 40 (1957), 143 N.E. 2d 377; Mtr. of City of N.Y. (Fifth Ave. Coach Lines), 22 NY 2d 613, 620-1 (1968), 241 N.E. 2d 717; Mtr. of City of N.Y. (Coogan), 20 NY 2d 618, 623 (1967), 233 N.E. 2d 113; Arlen of Nanuet v. State of N.Y., 26 NY 2d 346, 352-3 (1970), 258 N.E. 2d 890; City of N.Y. (Shorefront H.S.-Rudnick), 25 NY 2d 146, 148-150 (1969), 29 NY 2d 869, 870 (1971); Latham Holding Co. v. State of N.Y., 16 NY 2d 41, 44 (1965), 209 N.E. 2d 542.

this Court has repeatedly held to afford no basis for granting a writ of certiorari. Roberts v. New York City, 295 U.S. 264, 277-8 (1935), and cases cited ante, pp. 27-29.

(3)

Petitioner baselessly contends that "all evidence of the income to be expected" from its planned apartment house communities was excluded from consideration, as was "the standard method of valuation by capitalization of expected income" (Pet., pp. 16, 19). As previously shown, at the first trial petitioner valued its income projections on the assumption that it had already borne all of the risk of successfully financing, building and renting two apartment house communities estimated to cost between $300-$400 million dollars--so that a purchaser of raw acreage in a

remote and inaccessible area, having nothing more to do but collect rent, would pay a price based upon the value of a non-existent stream of rental income (ante, pp. 11-15). The fallacies underlying the concept that an award for vacant land may be based upon the value of non-existent income from a non-existent development thereof have been repeatedly exposed. U.S. ex rel. T.V.A. v. Powelson, 319 U.S. 266, 281, 285 (1943); Tallman v. M.E.R.R. Co., 121 N.Y. 119, 125 (1890); Arlen of Nanuet v. State of N.Y., 26 NY 2d 346, 352-3 (1970), 258 N.E. 2d 890; Levin v. State of N.Y., 13 NY 2d 87, 90-91 (1963), 192 N.E. 2d 155; Levitin v. State of N.Y., 12 AD 2d 6, 7 (3rd Dept., 1960); Vasile v. State, 30 AD 2d 1042 (4th Dept., 1968), affd. 24 NY 2d 969 (1969); Dist. of Col. v. Lot 813 in Square 568, 232 F. Supp. 714, 718-719 (D.C.

Cir., 1965).

Petitioner asserts that in United States v. 25,406 Acres of Land, etc., 172 F. 2d 990, 993 (4th Cir., 1949), cert. den. 337 U.S. 931 (1949), it was held "appropriate to use the capitalization of estimated future income in valuing the property" (Pet., p. 28). It was there expressly stated, however, that such valuation of a non-existent income stream from a non-existent development "was admitted, not as evidence of value (and this was carefully explained in the charge to the jury, where market value was correctly defined)," but because an expert may always explain the basis for his opinion regardless of how conjectural it may be (172 F. 2d at 993). In short, it was there admitted as "merely evidence of highest and best use" and not as a basis for valuing vacant land

as though it had already been developed for such use--as is pointed out in Dicker v. United States, 352 F. 2d 455, 458 (D.C. Cir., 1965).*

Although such non-existent income may not be valued as a basis of award for vacant land, it is settled law that evidence of income and construction costs may

*Although, on petition for a writ of certiorari, "Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority" (McCoy v. Union Elevated R. R. Co., 247 U.S. 354, 363 [1918], the New York rule plainly reflects this Court's view that "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value-a thing to be condemned in business transactions as well as in judicial ascertainment of truth." Olson v. United States, 292 U.S. 246 257 (1934).

properly be considered to establish a projected best use as one likely of achievement in the reasonably near future. Mtr. of City of N.Y. (Broadway Cary Corp.), 34 NY 2d 535, 536 (1974), 309 N.E. 2d 870; City of N.Y. (Shorefront H.S.-Rudnick), 25 NY 2d 146, 149 (1969), 250 N.E. 2d 333; Humbert v. State, 278 App. Div. 1041 (4th Dept., 1951), affd. 303 N.Y. 929 (1952); Dicker v. United States, 352 F. 2d 455, 458 (D.C. Cir., 1965). On the second trial, however, petitioner introduced no such proof (ante, p. 22). It relied, instead, on the progress achieved with respect to the abandoned buildings, but failed to show the economic feasibility thereof so as to provide some basis for assuming a similar development on the 95% of its land under review would have been equally

"successful" (ante, p. 22). In contrast, the F.H.A. had "considered even a small part of any such proposed development to be economically unfeasible," and the views of the city's experts to the same effect, "unlike that of the claimant, are amply supported by the evidence" (A.12a, A.14a; ante, pp. 20-23).

(4)

Finally, petitioner urges that "ruling out of consideration *** all the factors that a prospective purchaser" would consider, effectively deprived it of a fair trial (Pet., p. 19). All of the factors that a prospective purchaser would consider were thoroughly detailed by the New York courts on the basis of the record proof. Petitioner's purchase of the property, its planned development, the physical location and condition of the property, the

unavailability of financing for a $300-$400 million apartment house community in a remote and inaccessible area, the F.H.A.'s rejection of insured financing because of economic unfeasibility, the myriad problems already encountered--would have led any prospective purchaser to the conclusion of the New York courts that "every realistic sign points to its probable failure" (ante, pp. 20-25 ; A.12a).

Nevertheless, the measure of damages adopted by the New York courts compensated petitioner for its planned use of the land as the best use thereof. The Court of Appeals ruled that "the proper test for vacant land, unexploited or only partially exploited, is that found in Mtr. of City of N.Y. (Chestnut Props. Co.) (39 AD 2d 573, affd. 34 NY 2d 800)" [A.5a-6a]-where an on-going apartment house development was

held to be the land's best use (ante, pp. 18-19). In consequence thereof, petitioner was awarded several times its recent purchase price for the subject property, plus developmental costs that a purchaser undertaking to complete 95% of the planned community would have assumed (ante, pp. 24-26). See Dist. of Columbia v. Lot 13 in Square 568, 232 F. Supp. 714, 715-717 (D.C. Dist., 1964), affd. 346 F. 2d 833 (D.C. Cir., 1965); Orleans Parish School v. Montegut, Inc., 255 So. 2d 613, 617 (4th Cir. Ct. App., La. 1971); Rustcon Developers, Inc. v. State of N.Y., 33 AD 2d 582 (3rd Dept., 1969); Matter of County of Westchester, 204 Misc. 1037, 1038-9 (1953), affd. 285 App. Div. 1169 (2nd Dept., 1955); Salamone & Co. v. State, 40 AD 2d 916 (3rd Dept., 1972).

Petitioner's exhortation that the award herein may set "a pattern for subverting constitutional guarantees" (Pet., p. 19), is thus seen to be vacuous and incapable of creating a substantial federal question where none in fact exists.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: September 30, 1976.

Respectfully submitted,

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